PP

v.

WONG KOK WAH

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
AHMAD FAIRUZ JCA
HAIDAR MOHD NOOR JCA
[CRIMINAL APPEAL NO: J-09-46-1998]
8 DECEMBER 1999

CRIMINAL PROCEDURE: *Trial - Close of defence - Submission by counsel - Whether trial court duty bound to allow submission by counsel - Whether only a matter of discretion - Failure to allow counsel to address court - Whether an irregularity - Whether curable - Criminal Procedure Code ss. 174, 422*

The respondent was convicted of an offence under s. 4 of the Firearms (Increased Penalties) Act 1971 and was sentenced by the Sessions Court to life imprisonment and six strokes of the rotan. On appeal, the High Court ruled that the learned Sessions Court Judge had erred when he failed to allow the respondent's counsel to submit at the end of the defence case, and on that ground ordered a retrial of the charge. The facts showed, however, that both the prosecutor and the respondent's counsel did not submit before the learned Sessions Court judge, and neither did any of them apply to so submit. That being the case, in this appeal before the Court of Appeal, a question arose as to whether the issue of the learned trial judge's refusal to allow counsel to submit could at all arise in the circumstances, and in any case, whether such failure to invite the parties to submit had occasioned a serious failure of justice as to call for a retrial.

Held:
Per Haidar Mohd Noor JCA

[1] Bearing in mind s. 174 of the Criminal Procedure Code ('CPC'), the right of the prosecutor and the defence counsel to submit in a summary trial is a matter for the discretion of the court, unless the accused gives evidence or calls witnesses to give evidence in his behalf in which case the accused or his counsel may sum up his case. However, if one party is allowed to submit then the other party should also be allowed to do so.

[2] Since both the prosecutor and the defence counsel did not submit at the close of the defence case, and since neither applied to so submit, the question of refusal by the learned Sessions Court judge for both of them to do so did not arise. The learned High Court judge, in the circumstances, ought to have invoked s. 422 CPC and hold that the failure of the learned Sessions Court judge to invoke his discretion to invite them to submit did not occasion a failure of justice so as to warrant for a new trial.

[Appeal allowed; order of High Court set aside; conviction and sentence by Sessions Court affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Di Mahkamah Sesyen responden disabitkan dengan satu kesalahan di bawah s. 4 Akta Senjata (Penalti Lebih Berat) 1971 dan dihukum penjara seumur hidup dan 10 kali sebatan. Ketika rayuan, Mahkamah Tinggi memutuskan bahawa hakim Mahkamah Sesyen bijaksana telah silap kerana tidak membenarkan peguam responden untuk menggulung hujah di akhir kes pembela, dan atas alasan itu memerintahkan perbicaraan semula. Fakta bagaimanapun menunjukkan bahawa kedua-dua pendakwa dan peguam responden tidak menggulung hujah di hadapan hakim Mahkamah Sesyen bijaksana, dan tidak juga memohon untuk berbuat demikian. Oleh hal yang demikian, pada rayuan di hadapan Mahkamah Rayuan di sini, timbul persoalan samada isu keengganan hakim perbicaraan bijaksana untuk membenarkan peguam menggulung hujah samasekali boleh berbangkit dalam halkeadaan yang wujud, dan walau apaupun, samada kagagalan untuk memanggil pihak-pihak untuk menggulung hujah di sini telah menyebabkan kegagalan keadilan yang serius sehingga mematutkan suatu perbicaraan semula.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Mengambilkira s. 174 Kanun Acara Jenayah ('KAJ'), hak pendakwa dan peguam pembela untuk menggulung hujah adalah satu perkara budibicara mahkamah, kecuali tertuduh ada memberi keterangan atau memanggil saksi-saksi untuk memberi keterangan bagi pihaknya dalam kes mana tertuduh atau peguamnya bolehlah menggulung hujah. Walau apapun, jika sesuatu pihak dibenarkan untuk menggulung, maka pihak yang lain juga mestilah juga dibenar berbuat demikian.

[2] Oleh kerana kedua-dua pendakwa dan peguam pembela tidak menggulung hujah di akhir kes pembela, dan oleh kerana mereka juga tidak memohon untuk berbuat demikian, maka isu keengganan hakim Mahkamah Sesyen bijaksana membenarkan mereka berbuat demikian tidak timbul samasekali. Hakim Mahkamah Tinggi bijaksana, dalam halkeadaan yang wujud, harus menggunapakai s. 422 KAJ dan memutuskan bahawa kegagalan hakim Mahkamah Sesyen bijaksana untuk melaksanakan budibicaranya untuk memanggil kedua-dua pihak untuk menggulung hujah tidak menyebabkan apa-apa salahlaksana keadilan sehingga memerlukan satu perbicaraan semula.

[Rayuan dibenarkan; perintah Mahkamah Tinggi diketepikan; sabitan dan hukuman oleh Mahkamah Sesyen disahkan.]

Case(s) referred to:
Lee Kong Yin v. PP [1970] 2 MLJ 205 ***(refd)***
Mahindar Singh v. PP [1941] 10 MLJ (FMSR) 230 ***(refd)***
Monteiro v. PP [1964] 30 MLJ 338 ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 349 ***(refd)***
PP v. H Parnaby [1953] 19 MLJ 166
PP v. Seeralan [1985] 1 CLJ 524 ***(refd)***
R v. Sussex Justices ex p McCarthy [1924] 1 KB 256 ***(refd)***
Shaari v. PP [1963] 29 MLJ 22 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 174, 422
Firearms (Increased Penalties) Act 1971, s. 4
Straits Settlements Criminal Procedure Code, s. 184

For the Public Prosecutor - Zauyah Bee Loth Khan DPP
For the respondent - Gan Ping Sieu; M/s Gan & Zul

Reported by WA Sharif

JUDGMENT

Haidar Mohd Noor JCA:

This is an appeal by the public prosecutor against the order of the learned High Court judge at Muar allowing the appeal by the respondent whereby he set aside the conviction and sentence imposed by the learned Sessions Court judge. He ordered a retrial.

From the grounds of judgment of the learned High Court judge, it seemed clear that though a number of grounds were canvassed by the respondent's counsel he allowed the appeal only on one ground namely, the learned Sessions Court judge failed to allow the respondent's counsel to submit at the close of the case for the defence (p. 4 of the appeal record).

The respondent was charged in the Sessions Court at Batu Pahat, Johor under s. 4 of the Firearms (Increased Penalties) Act 1971 (Act 37), for exhibiting a firearm, that is, a Smith & Wesson .38 Special No. 321J80, in a manner which may likely put fear of death in the commission of a scheduled offence, to wit, preventing himself from arrest by a police officer, that is, Inspector Abdul Khalib bin Abdul Rahman, on 19 October 1988 at about 1.15pm at Batu 1/2, Jalan Kluang-Mersing, Kluang.

After a full trial before the learned Sessions Court judge, the respondent was convicted and sentenced to imprisonment for life and six strokes. The respondent was successful in his appeal before the High Court to the extent that a retrial before the Sessions Court was ordered by the learned High Court judge. As stated earlier, the appeal was allowed solely on procedural ground.

The issue is whether the learned High Court judge was right in the order that he made. In other words, the only point in this appeal is whether counsel for the respondent should have been allowed to address the learned Sessions Court judge whereas the learned High Court judge held that counsel for the respondent should have been given the opportunity to address the Sessions Court at the close of the respondent's case.

Counsel for the respondent relied on two cases namely, *Mahindar Singh v. Public Prosecutor* [1941] 10 MLJ (FMSR) 230 and *Lee Kong Yin v. Public Prosecutor* [1970] 2 MLJ 205 in support thereof.

In *Mahindar Singh v. Public Prosecutor, supra,* the reported judgment of Terrell, Ag. CJ was rather short. The learned Ag. CJ merely said that the failure to give an opportunity to the accused's counsel to address the court at the close of the case constituted a serious irregularity and ordered a new trial. The report does not disclose whether or not any evidence was led for the defence. Whether the serious irregularity could be cured by s. 422 of the Criminal Procedure Code (F.M.S. Cap. 6) was never considered by the learned Ag. CJ.

In *Lee Kong Yin v. Public Prosecutor, supra,* the facts showed that the learned President of the Sessions Court allowed the prosecution to submit, despite objections of defence counsel, on the statement made from the dock by the accused but refused the defence counsel to submit on the matter. Sharma J had this to say at p. 207:

> The refusal by the learned President to the defence counsel to address the court on a matter in which the learned President allowed the prosecution to address on it on the face of it appears unjust and this I think was not a proper exercise of the discretion by the learned President. It was obviously unjust and it is consequently unnecessary to consider whether actually any prejudice was caused to the accused or not.

Lee Kong Yin, supra, is a Malacca case and at that time the Straits Settlements Criminal Procedure Code was applicable to Malacca. However, Sharma J agreed that the provisions of s. 184 of the Straits Settlements Criminal Procedure Code are not the same as those of s. 174 of the Criminal Procedure Code (F.M.S. Cap. 6). In the event *Lee Kong Yin's* case really can be distinguished with the present case.

The relevant section in this case is s. 174 of the Criminal Procedure Code (F.M.S. Cap. 6) which reads:

> In summary trials under this Chapter:
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> (i) The officer conducting the prosecution need not open the case but may forthwith produce his evidence.
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> (ii) When the accused is called upon to enter on his defence, he or his advocate may before producing his evidence open his case stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution, and if the accused gives evidence or witnesses are examined on his behalf may sum up his case.
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> (iii) The officer conducting the prosecution shall have the right of reply on the whole case when the accused has adduced evidence.

Under s. 174 of the Criminal Procedure Code (F.M.S. Cap. 6), it appears that the power vested in the court for the prosecutor and the counsel for the accused to submit is a discretionary one. The accused or his counsel, however, may sum up his case if the accused gives evidence or witnesses are examined on his behalf. From the record of the proceedings, the prosecution and the defence counsel put in written submissions to the learned Sessions Court judge at the close of the case for the prosecution (see pp. 41 to 51 of the appeal record). It seems clear from the record that at the close of the defence case neither the prosecutor nor the defence

counsel made submissions and there is nothing on the record also to show that either of them made an application to the learned Sessions Court judge to do so. Therefore the issue of opportunity to address the court was denied to the counsel did not arise (*Monteiro v. Public Prosecutor* [1964] 30 MLJ 338); (*Public Prosecutor v. Abang Abdul Rahman* [1982] 1 MLJ p. 349). It appears that the learned Sessions Court judge came to his decision soon after the case for the defence was closed. In that respect, no injustice was caused to the appellant as the prosecutor did not make a submission at all. It would be otherwise if the prosecutor was allowed to submit but the defence was not allowed to do so as in the case of *Lee Kong Yin, supra*. Unless the record taken down by the learned Sessions Court judge is impugned, we can only go by the record (*Public Prosecutor v. Seeralan* [1985] 1 CLJ 524; [1985] 2 MLJ p. 33).

No doubt, it has been the practice in courts below to allow counsel to submit at the close of the case for the prosecution, such right however, has been held to be at the discretion of the court. As was said by Bellamy J in *Public Prosecutor v. H Parnaby* [1953] 19 MLJ at p. 166:

> Although in practice a Magistrate generally hears both sides on a submission of no case to meet at the close of the case for prosecution, he is in my view, not bound to do so.

To sum up, we would respectfully state:

(a) the right of the prosecutor and the defence counsel to submit in a summary trial is a matter for the discretion of the court, unless the accused gives evidence or calls witnesses to give evidence in his behalf in which case the accused or his counsel may sum up his case,

(b) if one party is allowed to submit then the other party should be allowed to submit as it is of fundamental importance that justice should both be done and be manifestly seen to be done. (*R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256).

In respect of this case from the record both the prosecutor and the defence counsel did not submit and neither did any of them apply to submit and the question of refusal by the learned Sessions Court judge for both or either of them to do so did not arise. In the circumstances the learned High Court judge should have invoked s. 422 of the Criminal Procedure Code (F.M.S. Cap. 6) that the failure of the learned Sessions Court judge to invoke his discretion to invite them to submit did not occasion a failure of justice so as to warrant for a new trial to be ordered by him (*Public*

Prosecutor v. Abang Abdul Rahman, supra; Shaari v. Public Prosecutor [1963] 29 MLJ 22). It was unfortunate though that s. 422 of the Criminal Procedure Code (F.M.S. Cap. 6) was not brought to the attention of the learned High Court judge in the appeal before him and quite naturally it was not accordingly considered by him as reflected in his written judgment.

Having heard counsel for the respondent on the merits of the case, we were not convinced that the learned Sessions Court judge erred or was wrong in convicting the respondent and to pass the sentence of imprisonment for life and ten strokes.

For the reasons stated, we allowed the appeal of the public prosecutor and set aside the order of the learned High Court judge. We affirmed the conviction and sentence by the learned Sessions Court judge.